

I dismiss the action. On the question of costs, there are two matters which merit consideration and I have considered them. First, the defendants raised the defence of fair comment which has failed. Such a defence, in my view, should not have been raised at all; there is no basis for it. Secondly, counsel for the 1st defendant, who is himself the 2nd defendant, went at great length in cross-examining all the witnesses called by the plaintiffs on extraneous matters which have no bearing on the issue at all, thus prolonging the trial unnecessarily. The defendants therefore must bear part of the costs for such ill-advised moves. I accordingly order the plaintiffs to pay to the defendants only two-thirds of the costs of this action. Both the defendants are represented by the same firm of solicitors, though at the hearing they were represented by separate counsel; but counsel for the 1st defendant is the 2nd defendant himself, and in effect assumed the role of leading counsel in the defence. In the circumstances, I allow only one set of costs to the defendants.

Claim dismissed.

Solicitors: *Godwin & Co.; J.B. Jeyaretnam & Co.; M.P.D. Nair & Co.*

CORONATION ELECTRONICS LTD. v. LALCHAND MAHTANI

[A.C.J. (Chan Sek Keong J.C.) July 23, 1986]

[Singapore — Suit No. 6602 of 1985]

Contract — Guarantee — Variation of terms — Whether defendant consented to variation.

Practice and Procedure — Conditional leave to defend — Whether ought to be given — Whether condition onerous.

By an agreement dated December 18, 1984, made between the respondent/plaintiff and one Tharoomals (HK) Ltd. ("Tharoomals") it was agreed that the plaintiff would open letters of credit in favour of one or more beneficiaries and at the risk and responsibility of Tharoomals in payment of a shipment of 2,200 pieces of video cassette recorders. Under the same agreement the defendant guaranteed the entire amount payable by Tharoomals under the agreement to the plaintiff. Pursuant to the agreement, the plaintiff opened letters of credit. As a result, Tharoomals became liable to pay to the plaintiff the amount of S\$1,969,000 and interest thereon.

On July 9, 1985, the plaintiff commenced this action against the defendant as guarantor claiming the sum of S\$2,172,026.19 being the aggregate of the sums alleged to be owing by Tharoomals under the agreement together

A with accrued interest up to date of issue of the writ. On August 1, 1985, the plaintiff took out a summons for summary judgment against the defendant. On January 8, 1986 the Assistant Registrar gave the defendant conditional leave to defend upon payment into court of the sum claimed or furnishing a bank guarantee within 30 days and costs of \$700 in the event of default. The defendant appealed.

B The issues before the court were whether on the facts the Assistant Registrar ought to have granted conditional leave to defend and whether the condition was onerous.

C The defendant pleaded, *inter alia*, a material variation of the agreement without his consent which thereby discharged him from liability.

Held, dismissing the appeal: (1) although in law (a) there is a distinction between mere knowledge of the variation and consent to the variation and (b) the guarantor is under no duty to warn the creditor agreeing to a variation with the principal when he knows that the variation is going to occur, an implied consent may be inferred from the circumstances, e.g. where the guarantor himself arranges the variation or where he is involved in the preparation of documents necessary for its execution;

(2) where a guarantor is a director of the principal debtor company and he negotiates with the creditor in that capacity, he will seldom, if ever, be allowed to plead that he had not assented to the variation in his capacity as a guarantor but only in his capacity as a director of the principal debtor;

(3) the totality of the affidavit evidence of the plaintiff strongly suggests that the defendant was fully aware of what was going on between the plaintiff and Tharoomals and indeed had participated in all the relevant facets of the deal;

(4) taking into account all the circumstances of this case, the defence was shadowy and that there was something suspicious in the defendant's mode of presenting his case.

Cases referred to:

- G (1) *M.V. Yorke Motors v. Edwards* [1982] 1 W.L.R. 444.
- (2) *Lloyds Bank Co. v. Ogle* (1876) 1 Ex. D. 262.
- (3) *Wren v. Emmett Contractors Pty Ltd.* [1969] 43 A.L.J.R. 213.
- (4) *Polak v. Everett* (1876) 1 Q.B.D. 669.
- (5) *Woodcock v. Oxford & Worcester Railway Co.* (1853) 61 E.R. 551.
- H (6) *Winstone v. Bourne* [1978] 1 N.Z.L.R. 94.

CIVIL SUIT.

Gurbani Prem Kumar for the appellant.
Molly Lim (Miss) for the respondent.

I *Cur. Adv. Vult.*

Chan Sek Keong J.C.: This is an appeal from the decision of the Assistant Registrar giving the defendant, who is sued as guarantor, conditional leave to defend this action, the condition being that the defendant pay into court the full amount

of the claim, *i.e.* the sum of \$2,172,026.19, or provide security to the plaintiff in the form of a bank guarantee within 30 days, failing which plaintiff would be at liberty to enter final judgment against the defendant.

The underlying contract giving rise to these proceedings is an agreement dated December 18, 1984 ("the Agreement") made between the plaintiff and Tharoomals (HK) Limited ("Tharoomals") whereby it was agreed that:

- (a) the plaintiff would open or caused to be opened letters of credit amounting to S\$1,969,000 in favour of one or more beneficiaries in Singapore as desired by the defendant and at the risk and responsibility of Tharoomals in payment of a shipment of 2,200 pieces of video cassette recorders ("VCRs");
- (b) Tharoomals would place with the plaintiff as margin in equivalent United States Dollars or Hong Kong Dollars an amount equal to 10% of the letter of credit amount *i.e.* S\$196,900 ("the margin deposit");
- (c) out of the 2,200 VCRs to be shipped, 200 VCRs would be supplied by Tharoomals to the plaintiff at the total cost price of S\$172,000, *i.e.* at S\$860 per piece; settlement of this sale transaction would be done at the same time as the settlement of payment by Tharoomals under the letters of credit but not later than January 31, 1985;
- (d) Tharoomals would pay to the plaintiff a financing commission of 1.5% of S\$26,581.50 per annum for opening the letters of credit and all bank charges and interest incurred by the plaintiff;
- (e) the defendant would extend his personal guarantee for the entire amount payable by Tharoomals under the Agreement to the plaintiff.

The guarantee of the defendant dated December 18, 1984 was endorsed on the Agreement. It reads:

"I hereby confirm that I have witnessed signing of this agreement and consented to stand liable for payment personally in case [Tharoomals] fail to pay amount on or before 31/1/85 as claimed by [the plaintiff] under letter of credit to be established by them as stated above. I further agree that [the plaintiff] have full rights to claim the amount from me in Singapore."

Pursuant to the Agreement, the plaintiff procured Overseas Trust Bank of Hong Kong to open two letters of credit, one in favour of L.M. (Far

A East) Buying House for S\$984,500 and the other in favour of Intra World also for S\$984,500. The beneficiaries negotiated the letters of credit and obtained payment in the amount of S\$984,500 each. As a result, Tharoomals became liable to pay to the plaintiff the amount of S\$1,969,000 and interest thereon.

B The defendant was a partner of both the beneficiary firms. He was also a director of Tharoomals.

C The plaintiff made repeated requests to and demands against Tharoomals for payment of the sum of S\$1,969,000 and interest thereon and other payments due under the Agreement but was not paid except for a sum of S\$50,000 in June 1985.

D One day after it commenced action against Tharoomals in Hong Kong on the same subject matter, the plaintiff commenced this action on July 9, 1985 against the defendant as guarantor claiming the sum of S\$2,172,026.19 being the aggregate of the sums alleged to be owing by Tharoomals under the Agreement together with accrued interest up to the date of issue of the writ.

E On August 1, 1985, the plaintiff took out a summons for summary judgment to be entered against the defendant. A large number of affidavits was filed on behalf of both parties. The hearing took place on January 8, 1986 before the Assistant Registrar who gave the defendant conditional leave to defend upon payment into court of the sum claimed or furnishing a bank guarantee within 30 days and costs of \$700 in the event of default.

G On January 14, 1986, the defendant filed a Notice of Appeal against the decision of the Assistant Registrar, but strangely enough, the Notice referred only to the provision of security in the form of a bank guarantee and not also against payment into court. I have assumed that this was an inadvertent omission and of no consequence since counsel for the plaintiff did not advert to or make any submission on this omission.

H I will now refer to the affidavits filed on behalf of both parties, because many of the affidavits were filed to rebut allegations of fact and explanations contained in the preceding affidavit, the most convenient way to deal with such allegations and statements is to refer to the affidavits filed in their chronological order:

- (a) On July 30, 1985, the plaintiff filed the affidavit of Malkani Bhagwan Hiranand ("MBH"), its manager, stating that the defendant had no defence. The second affidavit of MBH was filed on October 7, 1985 to explain the amount of interest claimed by the plaintiff.
- (b) The defendant filed in his affidavit on October 19, 1985 and averred that he was discharged from liability as guarantor by reason of a material variation of the terms of the Agreement, the variation being that the plaintiff had not obtained the 10% margin deposit from Tharoomals prior to the opening of the letters of credit.
- (c) The affidavit of Manohar Gangaram Ahuja ("MGA"), a director of the plaintiff, filed on November 6, 1985 in reply to the defendant's affidavit, asserted that all the relevant negotiations and discussions leading to the signing of the Agreement and the guarantee were conducted by him with the defendant personally; that shortly before the letters of credit were opened on December 31, 1984, he had agreed with the defendant during various telephone conversations as well as meetings with him personally at the plaintiff's Hong Kong office that part of the monies which the plaintiff then owed to Tharoomals on the running account operated between the two parties in respect of their general trading transactions, and which was in excess of the margin deposit, would be treated and used, temporarily, as the margin deposit until other arrangements were made; that at the same time, or shortly after this temporary arrangement, he asked the defendant for a cheque for the amount of the margin deposit and that subsequently the defendant on or about January 10, 1985 gave him [MGA] a cheque post-dated January 19, 1985 for the total amount of the margin deposit provided for in the Agreement in substitution for the said temporary arrangement.
- (d) The third affidavit of MBH, filed on November 7, 1985 on behalf of the plaintiff, averred that there was no variation of the Agreement because no specific method of placing the margin deposit was provided for in the Agreement and that the plaintiff, being "in possession" of the equivalent of the margin of \$196,000 in the running account with Tharoomals was entitled to treat (which it did) that equivalent amount as the margin deposit; that if there were variation, the variation was not material; that the defendant on behalf of
- A Tharoomals had agreed expressly with MGA to the variation; that further and alternatively, the defendant permitted the plaintiff to believe that he (the defendant) had assented to the variation and had raised no objection to the arrangement and the defendant again was involved on or about January 10, 1985 in agreeing to provide the plaintiff with a cheque for the amount of the margin deposit to replace the credit in the running account.
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- C (e) On November 22, 1985, Prem K. Gurbani, counsel for the defendant, filed an affidavit on behalf of his client in which he deposed, *inter alia*, that the defendant had informed him that the relevant negotiations and discussions leading to the conclusion of the Agreement were conducted not solely with the defendant but also and together with Kishore Mahtani, his brother; that the defendant had not agreed that the margin deposit would be obtained from the running account between the plaintiff and Tharoomals temporarily; that the plaintiff did not at any time require a deposit from Tharoomals and did not at any time raise the matter of the deposit with Tharoomals or the defendant; and that the defendant did not assent to any variation of the Agreement; that the cheque post-dated January 19, 1985 handed to MGA was only for HK\$602,000 (equivalent to S\$169,900 at HK\$3.56 = S\$1.00) which was far below the margin deposit (of \$196,900) and that such cheque was not given as the margin deposit but as security for the 200 VCRs to be sold by Tharoomals under the terms of the Agreement; and that the variation was a material variation.
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- G (f) The fourth affidavit of MBH filed on November 27, 1985, denied that Kishore Mahtani participated in the negotiations with the plaintiff and went on to assert that the entire responsibility for the negotiations and subsequent dealings between the plaintiff and Tharoomals rested on the defendant himself (and that was why he gave his personal guarantee); that the defendant on behalf of Tharoomals gave the actual instruction to the plaintiff for the establishment of the letters of credit; that the primary responsibility of the defendant for the Agreement and the consequences of Tharoomals' default were evidenced by copies of the telexes exhibited, that if there was any variation the defendant had complete knowledge and/or consented to it, and indeed if there was any such variation, it would have resulted from the defendant's own action,
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or rather failure to act, in his role as director of and sole agent for Tharoomals; and finally that the cheque for HK\$602,000 was not intended as security for the 200 VCRs and that in his experience the provision in international trade of security by a supplier of goods to the purchaser (rather than the other way round) was a very extraordinary practice and one which, in any normal case, had no commercial justification.

- (g) The affidavit of Kishore Mahtani filed on December 9, 1985 stated that he was throughout involved with the negotiations between the plaintiff and Tharoomals; that the defendant signed the guarantee because he was asked to and not for any other reason; that the plaintiff in its telexes did not regard the defendant as primarily responsible as the telexes were addressed to the deponent and other directors of Tharoomals; that the defendant had informed him that he had at no time agreed to a variation of the Agreement; and that the plaintiff had not answered Mr Gurbani's allegation as regards the purpose of the HK\$602,000 cheque.
- (h) The second affidavit of MGA filed on December 30, 1985 asserted that the plaintiff communicated with Kishore Mahtani only after it had failed to contact the defendant, that the cheque for HK\$602,000 was not given as a security for the sale of the 200 VCRs; that the defendant, shortly before giving MGA the cheque, told him that Tharoomals should not pay as margin more than 10% of the letters of credit amount of \$1,969,000 less S\$172,000 (i.e. 10% of \$1,797,000) as Tharoomals had agreed to sell to the plaintiff 200 VCRs at the cost of S\$172,000; that the defendant indicated that Tharoomals could not afford to give the plaintiff a cheque for larger than HK\$602,000 and in the circumstances, he had no alternative but to accept the cheque for HK\$602,000; that there was no discussion at all on the provision of security for the sale of the 200 VCRs; that in June 1985, the defendant's cheque was dishonoured upon presentation, that the reason for the late presentation was that Tharoomals had requested the plaintiff not to present the cheque for payment and that the plaintiff was hoping for payment in full from Tharoomals.
- (i) The affidavit of one Kishin Kumar Chuhamal Mahtani, a director of Tharoomals, filed on January 6, 1986 stated that the provision of security of HK\$602,000 was requested by the

plaintiff because the plaintiff having bought the 200 VCRs, did not take delivery (the price having fallen) but left them with Tharoomals for disposal on the plaintiff's behalf; that subsequently, the plaintiff changed its mind on this arrangement and agreed to accept a profit of HK\$10,000 from the sale of the 200 VCRs, that Tharoomals issued a credit note dated January 14, 1985 for the agreed sum of HK\$10,000 in favour of the plaintiff; that because of this settlement, the plaintiff did not present the cheque for payment until matters had come to a head in June 1985; that Tharoomals did not ask the plaintiff for a reduction of the margin deposit to S\$179,000 as Tharoomals could at that time afford to give a larger sum since Tharoomals had a credit of more than HK\$4 million in the running account with the plaintiff; and finally that HK\$602,000 was not equivalent value for \$179,000 (at the exchange rate HK\$3.44 = S\$1.00) but HK\$618,168.

On February 5, 1986, the defendant made an application to stay the conditional order of the Assistant Registrar until the appeal therefrom be heard on the ground that Tharoomals (in proceedings in Hong Kong) had appealed to the Judge in Chambers to set aside a default judgment and the judge had reserved judgment. The summons was fixed for hearing on February 13, 1986. On February 8, 1986, the plaintiff entered final judgment against the defendant upon his failure to comply with the conditional order of the Assistant Registrar. On February 20, 1986, the defendant filed an Amended Summons to stay execution on the final judgment entered against him on the grounds that, *inter alia*, the Hong Kong High Court had given judgment against Tharoomals for HK\$3,516,710 which was much less than the amount of the judgment. On March 3, 1986, the Assistant Registrar granted a stay of execution on the same terms applicable to the conditional order i.e. the judgment debt be paid into court or a bank guarantee be given.

The other matters which are relevant for consideration are the Hong Kong proceedings between the plaintiff and Tharoomals.

- (a) On July 8, 1985, the plaintiff commenced proceedings against Tharoomals in Hong Kong (1985, No. A4195) to recover S\$2,092,281.69 under the Agreement. Tharoomals gave notice of intention to defend but did not file its Defence. The plaintiff took out a summons for

summary judgment. Tharoomals did not show cause and judgment was entered against Tharoomals. On September 16, 1985, Tharoomals applied to set aside the judgment. The Master who heard the application dismissed the application.

- (b) Tharoomals appealed to the Judge in Chambers. Tharoomals' counsel submitted that Tharoomals did not have notice of the summons for summary judgment and that it had a defence on the merits in that there was an agreement between the parties to bring the amount claimed into the running account maintained between the parties; that the accounts kept by Tharoomals (supported by its accountants' certificate), showed in its favour a credit balance of HK\$6,866,149 on December 31, 1984 and that as at June 7, 1985 (one month before the writ was issued) there was a nil balance. The plaintiff produced its own accounts showing in its favour as at June 7, 1985, a credit of HK\$6,803,374. The judge proceeded to examine the accounts kept by both parties and decided that 4 items in the accounts (i) HK\$1,850,000 (ii) HK\$315,600 (iii) HK\$1,097,911 (iv) HK\$235,119 were all one way in favour of the plaintiff. The Judge accordingly affirmed the Master's judgment to the extent of HK\$3,516,710 and gave Tharoomals leave to defend the balance upon payment of such amount into court or the provision of satisfactory security. In his written judgment, the Judge said that it would not be right to shut out Tharoomals on the basis that the letter of credit transactions had to be viewed in isolation as he was not sure that there might not have been an agreement that the letters of credit should be brought into the running account. The Judge also said that the amount of HK\$3,617,972 which the plaintiff had credited itself on December 28, 1984 in the running account between the parties as payment due for the St Peter's trousers (alleged to have been delivered) could stand further inquiry, notwithstanding that Tharoomals had brought up the matter at the eleventh hour, as it was able to produce documentary evidence to support its contention that the trousers had never been delivered.
- (d) In the event, Tharoomals failed to comply with the order of the Court of Appeal and the plaintiff has entered final judgment against Tharoomals for the amount claimed.

The issues before me are whether on the facts

A the Assistant Register ought to have granted conditional leave to defendant and whether the condition is too onerous. As the Assistant Registrar had not given his grounds of decision, I have to consider the evidence and the arguments afresh.

B At the outset, counsel for the plaintiff raised a preliminary point. She contended that the order of the Assistant Registrar had been converted into a final judgment against the defendant and that accordingly the defendant had no order to appeal against. Furthermore, the defendant had not appealed against the default judgment which had become final. She referred me to section 22 read with section 29 and section 34(1)(e) of the Court of Judicature Act as a bar to this appeal. These provisions read as follows:

D "22. All appeals to the High Court in the exercise of its appellate civil jurisdiction shall be by way of rehearing, and the High Court shall have the like powers and jurisdiction on the hearing of such appeals as the Court of Appeal has on the hearing of appeals from the High Court.

E 29. The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals may be brought.

F 34(1) No appeal shall be brought to the Court of Appeal in any of the following cases:—

.....

(e) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final."

G She contended that as the judgment against the defendant was a final judgment, the defendant cannot now appeal against it. I rejected this point peremptorily as it had no merit in it. The defendant had filed a notice of appeal against the conditional order of the Assistant Registrar within the time permitted by the rules. In my view, the gravamen of this notice of appeal was that the Assistant Registrar was wrong in giving conditional leave to defend. A judgment entered in default of compliance with a condition does not affect an appeal that the condition should never have been imposed and therefore not subject to compliance in the first place.

I Further, it seemed to me that this argument confused a judgment which has become final because the time for appealing against it has expired with a judgment which by written law is expressly declared to be final.

The main arguments of counsel for the plaintiff and the defendant on the merits of this appeal are set out in the affidavits, the contents of which I have summarised above. Counsel for the plaintiff submitted that the Assistant Registrar's order was right as the defence was shadowy and that there was something suspicious in the defendant's mode of presenting his case: she referred me to the White Book 1985, paragraph 14/3-4/15 and the cases cited therein and particularly the speech of Lord Diplock in *M. V. Yorke Motors v. Edwards*⁽¹⁾ at page 450. The plaintiff's case is that the defendant had arranged or agreed or assented to or stood by a variation of the Agreement. Reference was made to the sworn statement of MGA that between December 18, 1984 and December 31, 1984 there were telephone conversations as well as meetings between MGA and the defendant personally at the plaintiff's Hong Kong office during which the defendant agreed to the variation of the Agreement. Reference was made to the various telexes exchanged amongst the plaintiff, the defendant and Tharoomals during the period from January 29, 1985 to April 2, 1985 which tended to show that the defendant was well aware of the liability of Tharoomals as well as his own legal position.

The defendant's case is that the defendant had denied that he had agreed to the variation. Reference was made to his own affidavit and that sworn by Kishore Mahtani. It was submitted that whether or not the defendant had agreed to the variation could only be determined by oral evidence and that on that ground alone the defendant had a triable issue and was entitled to unconditional leave. Counsel referred me to *Lloyds Bank Co. v. Ogle*⁽²⁾ where Bramwell B. held that Order 14 was not intended to apply to the case of a surety who had no means of knowing how the matter stood between him and the principal debtor and that "it ought to be a general rule that where there is no acknowledgment of the debt by the defendant, or anything else to show that the defence is for mere purposes of delay, in the case of a guarantor or surety like the defendant, he should not be prevented from going to trial." Counsel contended that the decision in *Lloyds Bank Co. v. Ogle* was applicable to the defendant's case as that the defendant had never acknowledged the indebtedness of Tharoomals to the plaintiff. Counsel further relied on the *dictum* of Bramwell B. that conditions should not be applied unless there was something suspicious in the defendant's mode of presenting his case.

A Before I examine the affidavits filed on behalf of the defendant. I should mention that, as pointed out by counsel for the plaintiff, the defendant did not personally deny MGA's allegations but instructed his counsel, and his brother, Kishore Mahtani, to do so on his behalf and that the court should take into account his failure to file his affidavit in considering his good faith. Counsel for the defendant explained that his client was abroad at the time and there was an urgency to file an affidavit on his client's behalf. In my view, this explanation does not really square with the facts. There was a court order that the defendant's affidavit should be filed by December 10, 1985 for the hearing which was fixed for January 8, 1986; counsel for the defendant filed his affidavit on November 22, 1985; these facts do not support the explanation. Furthermore, Kishore Mahtani's affidavit was filed on December 9, 1985 and neither deponent at that time mentioned the whereabouts of the defendant nor the fact that he was not able to file his affidavit.

E As the affidavits of defendant's counsel and Kishore Mahtani are in evidence, I will have to examine their contents. What did the defendant's counsel and Kishore Mahtani actually depose in the matter of the variation of the Agreement? The relevant paragraphs are as follows:

(1) *Prem K. Gurbani's* affidavit (paragraphs 4 and 6):

F "4. It is further alleged that the Defendant agreed that the deposit required by Clause (B) of the agreement would be obtained from the "running account" between the Plaintiffs and the principal debtors temporarily and that the Defendant agreed to this arrangement. I am informed by the Defendant and verily believe that this is not the case. The Plaintiffs did not at any time require a deposit from the principal debtors and did not at any time raise the matter of this deposit with the principal debtors or the Defendant. This is evidenced from the fact that there is no debit entry in the "running account" between the Plaintiffs and the principal debtors, which "running account" is exhibited to the said affidavit of Malkani Bhagwan Hiranand."

H "6. I am informed by the Defendant and verily believe that he did not at any time assent to any variation of the agreement."

(ii) *Kishore Mahtani's* affidavit (paragraph 5):

I "5. I am informed by the Defendant and verily believe that he had at no time agreed to a variation of the agreement between the Plaintiffs and the principal debtors. The fact that there was such a variation cannot be denied ..."

It is clear that these statements went so far and no more as to deny that the defendant had agreed

to any variation of the Agreement. They do not expressly or specifically deny the sworn statement of MGA that he had various telephone conversations as well as meeting with the defendant personally at the plaintiff's Hong Kong office when the variation was agreed upon nor do these statements specifically deny the plaintiff's case as set out in the affidavit of MGA filed on November 5, 1985 and the affidavit of MBH filed on November 7, 1985 that the defendant had agreed to the variation on behalf of Tharoomals. Nor do they deny that Tharoomals had agreed to the variation, but only that the defendant had not agreed to the variation of the Agreement. The defendant's surrogate denials were ambiguous; they were not inconsistent with a situation where Tharoomals had agreed to a variation and the defendant had agreed to the variation on behalf of Tharoomals. Nor do they deny that Tharoomals had agreed to the variation, but only that the defendant had not agreed to the variation of the Agreement. The defendant's surrogate denials were ambiguous; they were not inconsistent with a situation where Tharoomals had agreed to a variation and the defendant had agreed to the variation on behalf of Tharoomals.

It is to be noted that paragraph 4 of counsel's affidavit was not so much an averment of fact as a conclusion. The gist of it was that since there was no debit entry in the running account between the plaintiff and Tharoomals, there could not have been an arrangement between them to vary the terms of the Agreement. That might well be so but that cannot be proved by counsel's argument in that form as there might have been other reasons (as indeed there was) why the debit entry was not made.

I now consider the role of the defendant in these transactions. At all material times, he was a partner of the beneficiary firms, a director of Tharoomals and also the guarantor. Counsel for the plaintiff submitted that on the evidence disclosed in the affidavits, the defendant was primarily responsible for arranging and negotiating the terms of the Agreement. Counsel for the defendant submitted otherwise. In my view, the evidence as disclosed in the affidavits filed on behalf of the plaintiff and not denied or deniable by the defendant is clearly in favour of the plaintiff on this point. The VCRs were supplied by firms of which the defendant was a partner; he signed the Agreement on behalf of Tharoomals; he gave his personal guarantee when he was only a 10% shareholder in Tharoomals (whereas Kishore Mahtani,

A a co-director who was a 70% shareholder, did not give his guarantee); he instructed the plaintiff to open the letters of credit; he delivered the HK\$602,000 cheque to MGA; he signed the credit note for HK\$10,000 and the covering letter both dated January 14, 1985; all the telexes show that MGA had had discussions with the defendant on Tharoomals's liability and that MGA was desperately trying to contact the defendant.

B
C Apart from evasive denials, the defendant has not produced any documentary evidence to suggest that he was not the person responsible for all the negotiations before and after the terms of the Agreement were implemented or varied as alleged by the plaintiff.

D There are a number of other matters which in the course of argument impressed upon me as requiring further explanation by the plaintiff. On further consideration, they do not. First, the matter of the HK\$602,000 cheque. The plaintiff's explanation was that it was given as part of the variation arrangement to replace the credit in the running account between the plaintiff and Tharoomals. The defendant's counsel submitted that the explanation should not be accepted because (i) the statement of account made up to December 28, 1985 did not show a debit entry for HK\$602,000 and (ii) the sum of HK\$602,000 was much less than the margin deposit and that this was inconsistent with MGA's sworn statement that he had asked the defendant for a cheque for the full amount of the margin deposit and (iii) the said cheque was given as security for the 200 VCRs sold to the plaintiff, which security arrangement was subsequently abrogated by the plaintiff accepting a credit note for HK\$10,000 as representing its profits in the sale of the 200 VCRs and (iv) finally, the plaintiff had not given any explanation for the credit note.

H In my view, the plaintiff has given a reasonable explanation for the HK\$602,000 cheque. MGA deposed that although the amount of the cheque was less than the margin deposit, he had to accept it because Tharoomals could not afford to give a cheque for a larger amount. As regards the failure of the plaintiff to debit the running account for HK\$602,000 on December 28, 1985, it was unnecessary to do so because it was a temporary arrangement which was shortly after superseded by the giving of the HK\$602,000 cheque. Secondly, as for the omission of the plaintiff to explain the credit note for HK\$10,000, no further explanation is required if the plaintiff's version of the arrange-

ment is true. In contrast to these explanations, the defendant has not explained why, if his version of the purpose of the HK\$602,000 was true, it was necessary for Tharoomals on February 27, 1985 to request the plaintiff to withhold presentation of the cheque for payment for 24 hours. Tharoomals could simply have stopped payment of the cheque.

Thirdly, in his affidavit, Kishore Mahtani has provided a precise computation of the HK\$10,000 profit by using an exchange rate of S\$1.00 = HK\$3.44. Even then, he was constrained to explain away the computed profit of HK\$10,320 on the basis that it was reduced to HK\$10,000 (by whom, it was not stated). On or about January 10, 1985, when the cheque was given, the exchange rate was about S\$1.00 to HK\$3.50/3.55. Why was this exchange rate not used? A good reason would appear to be that if the prevailing exchange rate was used in the computation, no profit of HK\$10,000 could have been worked into the computation. It should be recalled that Kishore Mahtani deposed that the HK\$10,000 profit was for the sale of the 200 VCRs. It was not a foreign exchange gain. It could not have been a foreign exchange gain because the plaintiff had not at that time converted the Singapore dollar liability of Tharoomals into a Hong Kong dollar liability; in fact, the plaintiff's claim against Tharoomals was in Singapore dollars. The *bona fide* of this computation is also suspect in another aspect. It purported to explain how the figure of HK\$602,000 was arrived at, taking into account the profit of HK\$10,000 (reduced from HK\$10,320). The figure was not susceptible to explanation in this manner as on the day (*i.e.* about January 10, 1985) the cheque for HK\$602,000 was given, the parties had not yet agreed on the HK\$10,000 profit. I view this computation as a failed attempt at *ex post facto* rationalisation.

Tharoomals proffered the same explanation before the Judge in the Hong Kong proceedings. The Judge rejected it on the grounds that there was no reason for such security, the sale having been called off; it was grossly excessive as security for failure to deliver and finally, if it had anything to do with the 200 VCRs, Tharoomals would have no reason on February 27, 1986 to request the plaintiff not to present the cheque for 24 hours. For the same reasons and the reasons outlined above, I also reject the explanation of the defendant on this point.

Counsel for the defendant also relied on the

A decision of the Court of Appeal in Hong Kong granting conditional leave to Tharoomals to defend the plaintiff's claim as a ground for unconditional leave to the defendant in these proceedings. I am not convinced that anything in favour of the defendant can be inferred from the judgments of the Court of Appeal in Hong Kong. All the members of the Court of Appeal were in fact of the opinion that Tharoomals' case was not convincing, that it had not given a satisfactory explanation for failing to defend the action initially. For these reasons, the Court of Appeal ordered that the full amount of the claim be paid into court or security provided as a condition of Tharoomals being allowed to defend.

I find that the totality of the affidavit evidence of the plaintiff suggests strongly that the defendant was fully aware of what was going on between the plaintiff and Tharoomals and indeed had participated in all the relevant facets of the deal. *Lloyds Bank Co. v. Ogle*⁽²⁾ does not assist the defendant here because in that case there was a running account between the claimants and the principal, the surety was unable to ascertain if anything was due on the guarantee, he believed that nothing was due, he was one of several co-guarantors and he had not received any statement of account from the claimants showing the particulars of the claim against the principal or of the claim against himself. In the present case, the defendant was a director of Tharoomals and was fully aware of the Hong Kong proceedings between the plaintiff and Tharoomals. The liability arising out of the Agreement was admitted by the defendant on behalf of Tharoomals; he even asked for time until January 14, 1985 to pay and as late as April 4, 1985 was still asking for indulgence.

The principles of laws applicable to this case may be stated as follows: although in law (i) there is a distinction between mere knowledge of the variation and consent to the variation: see Menzies J. in *Wren v. Emmett Contractors Pty Ltd*⁽³⁾ and (ii) the guarantor is under no duty to warn the creditor agreeing to a variation with the principal when he knows that the variation is going to occur: see *Polak v. Everett*⁽⁴⁾; an implied consent may be inferred from the circumstances, *e.g.* where the guarantor himself arranges the variation: see *Wren v. Emmett Contractors Pty Ltd*⁽³⁾; or where he is involved in the preparation of documents necessary for its execution: see *Woodcock v. Oxford & Worcester Railway Co.*⁽⁵⁾. Also, where a guarantor is a director of the principal debtor company and he negoti-

ates with the creditor in that capacity, he will seldom, if ever, be allowed to plead that he has not assented to the variation in his capacity as a guarantor but only in his capacity as a director of the principal debtor: see Mahon J. in *Winstone Ltd. v. Bourne*⁽⁶⁾ at page 96.

The defendant's counsel also submitted that the condition of payment into court or providing security for the full amount of the claim (S\$2,172,026.19) had the practical result of unjustly depriving and actually deprived the defendant of his defence as judgment in default had been entered against the defendant. Save for this submission on the effect of the defendant's non-compliance, the defendant has not produced any evidence of his financial circumstances to enable me to determine the cause of non-compliance. The evidence on record suggests the defendant might not be lacking in financial resources. The telex sent by Ramesh Mahboobani, a director of Tharoomals, on April 1, 1985 which is reproduced below, reads:

"MR AHUJA IS VERY MUCH ANNOYED ON YR IRRESPONSIBLE BEHAVIOUR. FOR NO REASON I HV TO LISTEN TO HIM DUE TO YR WRONG ACTION. YOU FINALISED DEAL N ASKED ME TO REMIT ENTIRE SALE PROCEEDS OF GOODS COVERED BY THOSE L/CS TO YOU. PL REMIT FUNDS BACK TO ENABLE ME TO SETTLE ISSUE IMMEDIATELY AS OTHERWISE SITUATION IS BECOMING VERY CRITICAL".

I will now refer to one other matter which has some bearing on the defendant's mode of presenting his case. Before me, his counsel adopted a form of argument which could have had some effect in the rush to judgment but not otherwise. One example which I have already referred to is the argument that because the plaintiff did not make a debit entry in the running account, there could not have been agreement to vary the Agreement by the temporary use of the credit in the running account. Another example is the argument that as the plaintiff had not given his explanation for or denied the acceptance of HK\$10,000 credit note, it must follow that the defendant's explanation for the credit note (*i.e.* it was given as security for the 200 VCRs) was the truth. Finally, it was also suggested that because the defendant had failed to comply with the condition of payment into court or providing security, it followed that he did not have sufficient financial resources to do so and was therefore unjustly deprived of his defence. It seems to me that any defendant who has to rely on so many *non-sequiturs* is not likely to have much of a defence on the merits.

A Taking into account all the circumstances of this case, I am of the view that the defence is shadowy and that there is something suspicious in the defendant's mode of presenting his case. Accordingly, I dismiss the appeal with costs.

B *Appeal dismissed.*

Solicitors: *Prakash Gurbani & Chong; Freshfields.*

C TEO TIO KHIANG & ANOR v. OOI ENG TEONG

[O.C.J. (Lai Kew Chai J.) July 31, 1986]

[Singapore — Suit No. 1258 of 1982]

D *Tort — Negligence — Liability — Quantum of damages.*

Damages — Brain — Severe damage to — Gross intellectual deterioration and personality changes — Clavicle fracture — Quantum.

E *Road Traffic — Collision between motor cycle and motor pick-up — Negligence — Liability — Quantum of damages.*

F On the morning of December 9, 1980 the 1st plaintiff, who was riding a motor cycle with his wife (2nd plaintiff) as pillion rider, had a collision with a motor pick-up driven by the defendant. As a result the 2nd plaintiff suffered severe brain damage by reason of which she underwent gross intellectual deterioration and personality changes. The 2nd plaintiff also suffered a fracture of the right collar bone.

G At the time of the accident, the 2nd plaintiff was 21 years old and a mother of two children. She was working as a production operator in a factory. According to the plaintiffs the accident was caused entirely by the negligence of the defendant who, on the other hand claimed that the plaintiffs were responsible for their own misfortune or alternatively were respectively 35% and 20% contributorily negligent.

H **Held:** (1) the defendant was entirely to be blamed for the accident;

(2) damages were awarded as follows:
Pain and suffering and loss of amenities
(inclusive of clavicle fracture) \$70,000
Actual loss of earnings \$20,850
Loss of future earnings \$57,600
Losses of CPF contributions would be allowed for actual and future earnings at official rates
Claims for domestic help (past and future) \$37,228;

I (3) interest on general damages of \$70,000 at 6% per annum and on the actual loss of earnings, the CPF contributions, and expenses for domestic help at 3% per annum;